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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35504

REPLY OF OLIN CORPORATION AND SUNBELT CHLOR ALKALI
PARTNERSHIP TO THE PETITION OF UNION PACIFIC COMPANY
FOR A DECLARATORY ORDER

INTRODUCTION

In spite of the Board's recent refusal to issue a "policy statement in the abstract" on the reasonableness of liability-sharing arrangements¹, Union Pacific Railroad Company ("UP") has filed a petition seeking to obtain a similarly broad policy statement by way of a declaratory order. Specifically, UP has requested the Board to issue a broad policy statement by declaring that UP "can reasonably require, as a condition of providing common carrier service for TIH, that the TIH shipper accept responsibility for liabilities that are not caused by UP's negligence."² Although UP's petition is couched in terms of an alleged "concrete dispute" between UP on one side, and Olin Corporation ("Olin") and SunBelt Chlor Alkali Partnership ("SunBelt") on the other side³, UP's request for a broad declaratory order obviously is intended to apply to any TIH shipper (and be available to any railroad) and is exactly the type of abstract policy statement the Board just recently stated it would not issue.

Given the Board's recent April 15th decision on this matter, the Board should again deny UP's petition to institute a declaratory order proceeding. Furthermore, the Board should deny

¹ EP 698, Decision (STB served April 15, 2011).

² UP Petition 7.

³ See UP Petition 6.

UP's petition because states' laws already provide comprehensive schemes for allocation of liability and state governments are better situated to deal with issues of allocation of liability that affect the public interest.

FACTS AND ARGUMENT

SunBelt owns a chlor alkali facility at McIntosh, Alabama and is contractually obligated to deliver up to 250,000 tons of chlorine (approximately 2,777 rail tank cars) per year to its only chlorine customer located at LaPorte, Texas⁴ (the "SunBelt movement"). Olin, on behalf of SunBelt, negotiates freight rates for this chlorine volume with Norfolk Southern Railway Company ("NS"), the originating carrier in McIntosh. SunBelt is captive to NS.

Until March 30, 2011, the SunBelt movement was made under private contract between UP, NS and SunBelt whereby the chlorine was shipped from SunBelt's McIntosh facility via NS to New Orleans and then via UP from New Orleans to LaPorte. The private contract had a fair indemnity provision previously agreed to by SunBelt that did not require SunBelt to indemnify NS or UP for liabilities that SunBelt has no role in causing.

Leading up to March 30, 2011, SunBelt, UP and NS engaged in negotiations for a new contract; however, an agreement could not be reached. On March 31, 2011, NS placed SunBelt on public tariff NSRQ 70319, a joint NS/UP rate for transportation from McIntosh to La Porte via New Orleans. NSRQ 70319 did not contain any TIH indemnity provision.

In a highly unusual move, only twelve (12) days after SunBelt began shipping under NSRQ 70319, NS notified SunBelt that it amended the tariff to expire on May 1, 2011—the minimum twenty (20) day notice required by the Board's regulations. At the time it notified SunBelt of the expiration of NSRQ 70319, NS also notified SunBelt that the applicable tariff rate

⁴ The Texas customer has a contractual right to request delivery to alternative destinations.

would be published by UP in Tariff UPTF 4955, effective May 2, 2011. Unlike NSRQ 70319, which does not contain a TIH indemnity, UPTF 4955 incorporates the indemnities in Items 50 and 60 of UP Tariff 6607, which are the subject of UP's petition for a declaratory order. This publication of the joint rate by the destination, instead of the origin, carrier was highly unusual in and of itself, and even more so coming just twelve days after NS had first published the joint rate.

On April 15, 2011, only four days after NS notified Olin of the switch to UP's indemnity tariff, the Board issued its major decision dismissing EP 677 (Sub-No. 1) and EP 698, whereby it declined to adopt a policy statement approving the right of a railroad to establish, as conditions of transport, liability-sharing arrangements with shippers.⁵ This broad policy statement was requested by the AAR, of which UP and NS are members. In rejecting this request, the Board stated that it "will not issue such a policy statement in the abstract" and will continue its practice of addressing issues of reasonableness on a "case-by-case basis."⁶

As a result of the switch from the NS to the UP tariff on April 11, 2011, UP has alleged a "concrete dispute" with SunBelt. UP claims this "dispute" would allow the Board to "approve" UP's 6607 indemnity tariff under the Board's April 15th decision. Although UP seeks to frame its petition to the Board in terms of an alleged dispute that has been outlined above, UP is actually seeking one more time to obtain a broad policy statement that could be applied to any

⁵ EP 698, Decision (STB served April 15, 2011).

⁶ Id. 4 n. 8.

TIH shipper (and available to any railroad).⁷

Because the Board has already declared that it will not issue such a broad policy statement, UP's petition should be denied and a proceeding to issue a declaratory order should not be initiated.

Respectfully submitted on behalf of the Olin Corporation and SunBelt Chlor

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⁷ The *Statement in Support of Petition* filed by Canadian Pacific Railway Company ("CP") in this matter makes clear that UP is seeking a broad policy statement. In fact, CP states that the declaration sought by UP "would provide much needed guidance to the rail industry and to TIH shippers" and would "resolve the issues of industry-wide importance that UP's petition raises." FD 35504, CP Statement in Support of Petition 1, 3 (filed May 13, 2011).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2011, I caused a copy of the foregoing *Olin Corporation and Sunbelt Chlor Alkali Partnership's Reply To The Petition Of Union Pacific Company For a Declaratory Order* to be served by U.S. First-Class mail, postage prepaid, on:

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